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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. [redacted] 50

CHARLES A. SHEPARD, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

HARRY W. COLMERY,
BALFOUR S. JEFFREY,
C. L. KAGEY,
L. M. KAGEY,
Counsel for Petitioner.

DORAN, KLINE, COLMER & COSGROVE,
KAGEY & BLACK,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 942

CHARLES A. SHEPARD, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of Charles A. Shepard respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

Charles A. Shepard, petitioner, was convicted of the murder of his wife, Zenana Shepard (R. 26) and sentenced to life imprisonment by the United States District Court, for the District of Kansas, First Division (R. 30). The indictment, returned on April 18, 1930, charged the first degree murder of Zenana Shepard,

by poisoning, on the United States military reservation at Fort Riley, Kansas (R. 1). At the December, 1930, term, the jury returned a verdict of "* * * guilty as charged in the indictment, without capital punishment" (R. 26). On appeal to the United States Circuit Court of Appeals for the 10th Circuit, this judgment was affirmed on January 9, 1933, Judge Phillips dissenting (R. 594). Petition for rehearing was denied April 5, 1933, Judge Phillips again dissenting (R. 635).

During the course of the trial, Clara Brown, the nurse who had attendent the decedent during her illness, was permitted to testify, in answer to questions by the court in rebuttal, that the deceased stated to her, "She said, Doctor Shepard has poisoned me" (R. 524-7). After a motion to strike by counsel for the petitioner, the United States Attorney withdrew that evidence (R. 527). The witness was recalled the next day, her testimony repeated, and submitted to the jury over the objection and exception of counsel for the petitioner (R. 562-6). After undertaking to lay a foundation for a dying declaration, by having the witness state that, on the second day of her illness (25 days before her death), Mrs. Shepard said, "She was not going to get well; she was going to die;" the witness testified that she said that, "She was being poisoned" and "Dr. Shepard has poisoned me" (R. 562-5). At the first offering the prosecution suggested res gestæ as the theory of admissibility (R. 526). At the second offering the record shows indisputably that the testimony was offered and received as a dying declaration (R. 562-4). The jury was not

admonished as to any restricted use or application of the testimony (R. 565-6).

The testimony of many witnesses, both for the prosecution and the petitioner, most of whom were medical men who had observed and attended the deceased during her illness, and especially at about the time of her alleged declarations, showed her to be ill and delirious (R. 137-9), in a state of collapse, and suffering a mental confusion (R. 63); that she would apparently hear voices when no one had spoken, continually reach out to pick objects from the air and brush them off her bed (R. 137-354); would talk of having been to places and having visited with people which were utterly impossible in fact (R. 356), and suffering many hallucinations (R. 354); that she was blind to the extent she did not recognize people (R. 56) or her fingers in front of her (R. 354).

The Circuit Court of Appeals held that the testimonies of Nurse Brown and Sergeant Gresser were not admissible as dying declarations or for the truth of the matter asserted and contained in them, because the guaranties of trustworthiness were lacking, and the declarant had no belief of immediate and impending death, and because the statement to Sergeant Gresser was not one of fact but opinion (R. 598). However, it held that this testimony was competent to refute the defendant's theory of suicide, as circumstantial evidence showing the state of mind of the deceased (R. 598; *Shepard* v. *United States*, 62 F. (2d) 683, 685)—a theory advanced for the first time in the Government's brief on appeal. In denying the petition for rehearing the majority also held that this

evidence was not serious and fatal to the petitioner's rights (R. 637-8).

The majority conceded the contention that it was error to admit evidence held competent for only a restricted purpose without instructing the jury as to that purpose, but held that such error was waived because trial counsel had not requested such an instruction, and any objection which petitioner may have had to the instructions of the trial court had been waived because his counsel at the trial accepted them as satisfactory (R. 599).

Judge Phillips dissented on the grounds that the evidence was neither admissible as dying declarations as evidence of the facts stated (R. 602), nor to show a state of mind for the purpose of refuting other declarations showing a state of mind disposed to suicide; that they were narratives of past events whose sole probative value was as evidence of the fact stated (R. 603-4); and were not surrounded by circumstantial guaranties of trustworthiness, but on the contrary were accompanied by circumstances which cast suspicion on their reliability (R. 638-41). Judge Phillips held further, that if the declarations were admissible for only a restricted purpose to show a state of mind, and not for truth of the facts stated, it was the duty of the trial court to limit their use by the jury, by an instruction given to them (R. 604), and that failure to do so was positive error, in that the jury was permitted to consider the evidence as a proof of a fact of which it was no proof (R. 607); that a request for such an instruction would have been futile because in-

consistent with the theory under which the declarations were offered and received (R. 605); and that even so the petitioner should not be "waived" into the penitentiary by failures of counsel (R. 605).

A few days before the trial, at Kansas City, Kansas, a newspaper article concerning the case was published in the *Kansas City* (Missouri) *Star* (R. 38). There was no showing that the petitioner either wrote or inspired the publication of the story. In selecting the jury, the trial court, without examination to find out whether they had formed an opinion about the case, disqualified, summarily, 7 members of the panel who had read the article (R. 45-93) and 3 who were examined but had formed no opinion (R. 38-44). One of these 3 was challenged for cause by the prosecution (R. 44). The petitioner exhausted all of his peremptory challenges before a jury was selected (R. 49). Counsel for the petitioner excepted and objected to the procedure and moved to quash the panel and discharge the jury (R. 50). The Circuit Court of Appeals held there was no error because the court had the power to pass on the qualifications, and there was no error unless there was an abuse of discretion, and that the petitioner had no ground of complaint because he was tried before an impartial jury (R. 595).

In his opening comment on the evidence to the jury the court, in speaking of the petitioner's life record, said, "From that time on until the date *this murder* is alleged to have been committed * * *." As the crime to be proved was "murder" the court, at the outset, definitely indicated that he was satisfied that

that which the Government was required to prove, that is, the murder of Zenana Shepard, had been accomplished to his satisfaction.

In commenting upon the evidence to the jury, the trial court discussed the autopsy which was performed, and, that from the findings, certain witnesses estimated that the viscera contained from 2½ to 3 grains of mercury (R. 584). The Government's theory was death by mercurial poisoning. Although there was abundant evidence that Mrs. Shepard was disgusted with life, had stated that she intended to kill herself, did not want to live, expected to die soon, that she took morphine and drank alcoholic liquor excessively, and may have taken bichlorid of mercury with suicidal intent (R. 346-7, 354-7, 383, 386-7, 394, 405-7, 411-4, 470-4, 476-8, 483, 485-6, 488-9, 492-3, 497-9, 515-6); that death might have been due to Vincent's angina infection definitely diagnosed (R. 361-2, 370-1, 373); that both Government and defense witnesses testified that the mercury in the viscera could have been absorbed through the mouth wall through treatment of Vincent's angina (R. 371, 391, 398, 132, 507), and her death caused in that manner (R. 400, 508), the court at the outset said to the jury, "There then arises these two questions: Did this woman die of mercurial poisoning? and, secondly, Did the defendant, Charles A. Shepard, administer the mercury to her as charged in the indictment?"

Thereafter the court outlined to the jury in great detail the testimony of the Government's witnesses to show that death was caused by mercurial poisoning

(R. 585-6). And although there was abundant evidence to show that attending physicians diagnosed her condition as *polyneurotic alcoholic psychosis* (R. 354-6) that her condition was typically alcoholic and not due to mercury poisoning (R. 358-9); that there was no evidence of mercury mouth (R. 358); that army men of broad experience in the treatment of Vincent's angina diagnosed her case as such and prescribed a mouth wash of mercuric chloride and treated it over a period of two weeks up to the day of her death; and that condition gradually improved, but had the mouth been a mercury mouth, would have got worse under mercury treatment (R. 369, 370-6); that microscopic smears were taken from the ulcers in the intestines and showed both *spirochete* and *bacillus fusiformis* germs of Vincent's angina (R. 361, 372-3); that people die from Vincent's angina (R. 373, 361-2); and that acute *nephritis* or congestion of the urine, characteristic of mercury poisoning, were not present (R. 88, 106, 131, 511); that Mrs. Shepard was disgusted with life and stated she had intended to kill herself, did not want to live, expected to die soon, and took morphine and drank alcoholic liquors excessively (Reference supra)—*the court passed this all over with the cursory statement that,* "There was evidence tending to show that the deceased, Zenana Shepard, had made threats of suicide and statements to the effect she wanted to die; also evidence as you will recall, tending to show she might have been poisoned by the mouth-wash. Such evidence is competent for the purpose of showing she might have taken poison to end her

life or that the mouthwash might have caused her death" (R. 590). And although there was abundant evidence by both Government and defense witnesses, including eminent Government pathologists, that Mrs. Shepard could have absorbed enough mercury from the mouthwash to have caused her death (R. 132, 371, 391, 398, 507), and that death was due to that cause (R. 400, 508); that an army physician of broad experience in the treatment of Vincent's angina prescribed mercuric chloride, personally administered the mouth wash once and sometimes twice a day for over a period of two weeks, administering 21 ounces of it which would have contained approximately 2 grains of mercury (R. 370); that 4 or 5 bottles of the solution were used altogether (R. 570, 569); yet the court, in describing the mercury solution administered as a mouth wash, *failed to state that it contained mercury* (R. 587), *and out of all this testimony so vital to the defense baldly stated that,* "There has been testimony introduced that the deceased might have absorbed by the use of this mouth wash, enough mercury to account for the amount of mercury found in the viscera of the deceased" (R. 587).

And although the court stated that in order to show that the petitioner administered the mercury, that as Officer of the Day he had access to the dispensary where poisons were kept, got empty capsules, had 3 prescriptions for bichlorid of mercury filled (R. 588-9), he entirely omitted to state that there was testimony by others to the effect that there was nothing unusual about the petitioner's getting either mercury or capsules or having it in his possession, that the peti-

tioner or any other doctor could have gone to the dispensary and got mercury and nothing would have been said about it; that doctors carry a kit with a container for mercury tablets; that mercury was used a great deal as a disinfectant and for ear trouble; that Major Dye had written prescriptions for bichlorid of mercury and alcohol, had them filled, and carried them on his table as stock remedies for the treatment of running ears and measles cases and that he and Major Shepard had discussed this as the treatment to use (R. 123-4, 362, 420, 431). The Circuit Court of Appeals brushed aside the alleged errors in the one-sided and unfavorable comment on the evidence by stating that the instructions had been accepted as satisfactory by defendant's counsel (R. 600).

At the close of all the evidence the defendant presented its motion for a directed verdict, which was overruled, and exception allowed (R. 574).

B.

Reasons Relied on for the Allowance of the Writ.

In an action in which petitioner was tried and convicted for the murder of his wife, and sentenced to life imprisonment, the Circuit Court of Appeals erred:

1. In approving the admission of hearsay declarations to prove the state of mind of the deceased to rebut suicidal intent, which were not admissible as either dying declarations or part of the *res gestæ* to show the truth asserted, did not show a present existing state of mind but were narratives of past events and which were not made under circumstances free from

suspicion and misrepresentation and were not surrounded by substantial guaranties of trustworthiness;

2. In holding that evidence, not competent for a purpose obvious to laymen, but which is admissible for the narrow and restricted purpose of showing a state of mind, may be submitted to a jury without any limitation or direction from the trial court as to its use and applicability, and the failure of counsel to request an instruction for that purpose waives the defendant's rights in that regard;

3. In approving one-sided and unfavorable and prejudicial comments on the evidence by the trial court, and in holding that the defendant's rights to object were waived by counsel who stated that the instructions were satisfactory, thus placing the duty of counsel "to be fair to the court" which has a duty to perform, above and paramount to "fairness to the accused" who has rights to be protected, in the interest of securing to him a fair and impartial trial;

4. In approving the disqualification of jurors who had read newspaper accounts of the case but who had formed no opinion and without examining them to ascertain whether they had any opinion, the defendant having exhausted all his peremptory challenges, and in finding that the selection of a jury in such a manner did not work a serious prejudice to the petitioner or violate his rights under Sec. 287 of the Judicial Code (28 U. S. C. A. Sec. 424) or the rights of the petitioner to an impartial jury under the 6th Amendment to the Constitution of the United States;

5. And that the decision of the Circuit Court of Appeals illustrates how the course of judicial decisions in the Federal and state courts applying and interpreting the decision of this Court in *Mutual Life Ins. Co.* v. *Hillmon*, 145 U. S. 285, 12 S. Ct. 909, 36 L. Ed. 706, has lead to so much confusion and uncertainty that the evidential doctrine stated therein has become so unintelligible certainly to the layman, probably to lawyers, and possibly now and then even to judges, that this Court should interpret and declare the applicability of the principles of that case to avoid conflict in, and secure a uniformity of decisions in the Federal and state courts;

6. And because said decision and judgment of the Circuit Court of Appeals decides questions of substance each of which complained of is decided in a way probably not in accord with the applicable decisions of this Court, and which have not been, but should be, settled by this Court, and in such a way as to depart so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

C.

Questions Presented for Review by the Court.

The questions presented for review by the Court are:

1. Did the Circuit Court of Appeals err in finding and holding that the declarations of deceased, as reported by Nurse Brown and Sergeant Gresser, were admissible to show state of mind?

2. Did the Circuit Court of Appeals err in finding and holding that such evidence, not competent for a purpose most obvious to laymen, but admissible for a narrow and restricted consideration, may be submitted to the jury without any direction or limitation by the court as to its use and application?

3. Did the Circuit Court of Appeals err in finding and holding that in a case where the petitioner was on trial for life or liberty for life, the failure of counsel to request an instruction to limit the application and use of testimony admitted for a restricted purpose, and his statement that the court's instructions were satisfactory, waived the rights of the accused which would otherwise have been protected, and any right he may have had to have a fair trial assured him by fair and impartial comment on the evidence by the court?

4. Did the Circuit Court of Appeals err in finding and holding that there was no error in the trial court's disqualifying jurors who had not formed an opinion, or without examining them to ascertain whether they had formed an opinion, where the defendant had exhausted all of his peremptory challenges and under such circumstances did the accused have a fair and impartial trial?

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding that Court to certify and to send to this Court, for its review and determination, on a day cer-

tain to be therein named, a full and complete transcript of the record of all proceedings in the case numbered and entitled on its docket No. 564, *Charles A. Shepard,* appellant, v. *United States of America,* appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just. And your petitioner will forever pray.

CHARLES A. SHEPARD,
By HARRY W. COLMERY,
BALFOUR S. JEFFREY,
C. L. KAGEY,
L. M. KAGEY,
Counsel for Petitioner.

DORAN, KLINE, COLMER & COSGROVE,
KAGEY & BLACK,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Court Below.

The opinion of the United States Circuit Court of Appeals (R. 594) sought to be reviewed is reported in 62 Fed. (2d) 683. The opinion of that court denying a rehearing (R. 635) is not yet reported, but was filed by the Circuit Court of Appeals for the Tenth Circuit with the clerk of that court on April 5, 1933.

II.

Jurisdiction.

Judgment was rendered in the United States District Court, for the District of Kansas, on February 3, 1931 (R. 30), and affirmed by the Circuit Court of Appeals, January 9, 1932 (R. 607), and rehearing denied April 5, 1933 (R. 642). On April 10, 1933, the mandate was ordered withheld and execution of judgment stayed for thirty days to permit filing of this petition (R. 643). The jurisdiction of this Court is invoked under Sec. 240 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938(a) (28 U. S. C. A. 347). The petitioner was tried under an indictment charging first degree murder committed on the United States military reservation at Fort Riley, Kansas (R. 1).

III.

Statement of the Case.

The facts material to the matter involved and the issues raised in the Circuit Court of Appeals have already been stated in the petition (Point A, pp. 1-9), which is hereby adopted and made a part of this brief.

IV.

Specification of Errors.

1. The Circuit Court of Appeals erred in finding and holding that the declarations of deceased, as reported by Nurse Brown and Sergent Gresser, were admissible to show state of mind;

2. The Circuit Court of Appeals erred in finding and holding that such evidence, not competent for a purpose most obvious to laymen, but admissible for a narrow and restricted consideration, may be submitted to the jury without any direction or limitation by the court as to its use and application;

3. The Circuit Court of Appeals erred in finding and holding that in a case where the petitioner was on trial for life, or liberty for life, the failure of counsel to request an instruction to limit the application and use of testimony admitted for a restricted purpose, and his statement that the court's instructions were satisfactory, waived the rights of the accused which would otherwise have been protected, and any right he may have had to have a fair trial assured him by fair and impartial comment on the evidence by the court;

4. The Circuit Court of Appeals erred in finding and holding that there was no error in the trial court's disqualifying jurors who had not formed an opinion, or without examining them to ascertain whether they had formed an opinion, where the defendant had exhausted all of his peremptory challenges, and that under such circumstances the accused had had a fair and impartial trial.

V.

ARGUMENT.

A.

The Circuit Court of Appeals erred in finding and holding that the declarations of deceased, as reported by Nurse Brown and Sergeant Gresser, were admissible to show state of mind.

The testimony of Nurse Brown and Sergeant Gresser has been summarized in the foregoing petition (Point A, pp. 2-3; complete at R. 562, 539). This testimony was not admissible for any purpose because:

1. THE DECLARATIONS ARE NOT ADMISSIBLE FOR THE TRUTH OF THE MATTER ASSERTED.

(*a*) *The testimony was not admissible as a dying declaration or as part of the res gestæ.*

The evidence was undoubtedly offered and received by the trial court as a dying declaration for the truth of the matter asserted in the statement by the deceased (R. 562-4). On authority of *Mattox* v. *United States,* 146 U. S. 140, the Circuit Court of Appeals

correctly held the testimony inadmissible as lacking the substantial guaranties of trustworthiness for the oath and cross-examination required by a belief of imminent death. The testimony of Sergeant Gresser was further held inadmissible as opinion, *Shepard* v. *United States,* 62 Fed (2d) 683, at 685; R. 598).

The court did not consider the evidence admissible as part of the *res gestæ.* The statement was not made as an integral part of the act related but was made subsequent to that act. Neither was it made during a startling and sudden event by a declarant with knowledge and laboring under such a stress of excitement caused by the event as to make the utterance spontaneous and unreflected.

(*b*) *The testimony was not admissible to show condition of mind as truth of the matter asserted.*

The exact theory upon which the evidence was held admissible by the court is difficult to determine. The opinion written by Judge Cotteral makes only the bare assertion that the evidence was competent to show a state of mind as rebuttal to the defense theory of suicide (R. 598). Condition of mind may be revealed in two manners: *First,* by direct declaration of the state of mind. *Second,* by statements not directly declaring state of mind, but which provide circumstantial evidence giving rise to an indirect inference of the state of mind, the same as any external act may give rise to an inference which describes the mental condition. The former is hearsay; the latter is not.

The majority opinion shows that it relies entirely upon *Mutual Life Ins. Co.* v. *Hillmon,* 145 U. S. 285,

12 S. Ct. 909, 36 L. Ed. 706; *Commonwealth* v. *Trefethen,* 157 Mass. 180, 31 N. E. 961; and 3 *Wigmore on Ev.,* Sec. 1725, wherein Professor Wigmore discusses a direct statement of plan, design, or intention as an exception to the hearsay rule as a statement of mental condition. These cases are totally inapplicable in doctrine or facts. In the *Hillmon* case, the defendant offered letters and testimony of the contents of letters written by Walters, from Wichita, to his betrothed and to his parents in Iowa, expressing an intention to leave Wichita, with Hillmon. This Court held the evidence competent for a restricted purpose, not to show that Walters "actually went away from Wichita, but as evidence that, shortly before the time when other evidence tended to show that he went away, he had the intention of going, and of going with Hillmon" (l. c. 296). *Commonwealth* v. *Trafethen* arose from the trial for murder of a woman by an accused seducer. The defense of suicide was set up and the declaration of the young woman made the day before her death that she was going to drown herself was held to be admissible. In *Hunter* v. *State,* 40 N. J. L. 495, statements of the deceased, that he was going to Camden with the accused on business, were admitted.

Professor Wigmore has grouped those cases under an exception to the hearsay rule which he calls statements of mental condition (*Wigmore on Ev.* (2d ed.), Sec. 1725, Vol. 3, p. 696). He says of the above cases and of that hearsay exception, "The only limitations as to the use of such statements (assuming the fact of the design to be relevant) are those suggested by the general principle of this exception, namely, the

statements must be of a *present existing state of mind*, and must appear to have been made in a natural manner and not under circumstances of suspicion."

The cases bear out that limitation. The difference between those cases above, relied upon by the court, and the case at bar is manifest. In those cases there is a direct statement of intention to do a future act, and the ultimate issue to be determined is whether there was a future act in accord with that intention. The statements were made at a time prior to the act in question and were offered and admitted to prove the facts contained in the declaration. In the *Hillmon case,* a statement of expectation to go on a trip was offered to show that he intended to go on a trip. But here, the declaration that "Dr. Shepard has poisoned me" is not a direct statement of the state of the deceased's mind. If it throws any light on the mind of the declarant, it is only by way of circumstances, giving rise to an indirect inference, and is not by way of the truth of the matter asserted. It is also a statement made subsequent and not prior to the act in question.

Taking the statement as a truth for which it must be considered to come within any hearsay exception, it states but one fact, and is only a statement of a previous occurrence, a fact external to the mind, and a narrative of a past event. The declaration itself shows nothing concerning the mind of the declarant. It does not purport to describe it. To be admissible it must be a statement of present existing state of mind, and the narrative of a past event cannot be said to logically show a present existing condition of mind, which is an absolute requisite to come within this ex-

ception of the hearsay rule (*Wigmore on Ev.* (2d. Ed.), Sec. 1725).

The only two exceptions which might be applicable in any manner are dying declarations and *res gestæ*, both of which were denied by the court (R. 598-9).

Counsel for petitioner have been unable to find any authorities considering the exact situation here in light of a hearsay exception. To say that this testimony was admissible to show a condition of mind would require finding that a declaration, not a direct statement of mental condition, but only an utterance of a past event, may be shown to prove a present mental condition, which alone is of no value, unless the step from mental belief to the very past action or non-action recited in the statement, may be inferred. If the evidence is not directly admissible to show the truth of that which it recites, it certainly could not be admissible to prove that very thing by the indirect method of allowing it to show a present state of mind from which a past event may be inferred.

There is no justification in rule or reason for admitting this evidence for the truth of the matter asserted under the hearsay exception of statements of a mental condition. To admit the evidence under the rule of the *Hillmon case* carries that case far beyond its ruling and doctrine.

However, if this Court should believe that there is justification for admitting this testimony as hearsay, the petitioner respectfully calls attention to the additional requirement that there be some circumstantial guaranties of trustworthiness, and to review of the evidence concerning the surrounding circumstances

under which the declarations were made in this case (Petition, p. 2).

The court has ruled the evidence not admissible to show the event happened, and that it is competent only to show a state of mind inconsistent with suicide. The only logical meaning of that ruling and of the opinion is that the Circuit Court of Appeals considered it proper as circumstantial evidence of a state of mind.

2. THE TESTIMONY WAS NOT ADMISSIBLE TO INDICATE CIRCUMSTANTIALLY THE DECLARANT'S STATE OF MIND.

The declaration of Mrs. Shepard was not a direct statement of her belief or state of mind, but only the basis from which the state of her mind might be inferred.

Because the evidence was introduced on rebuttal by the prosecution does not avoid the application of ordinary and established principles of law. Rebuttal evidence must be competent and satisfy the same rules of evidence as testimony offered on case in chief. The relevancy may be different; the rules of law are the same.

The court held that the declaration was not admitted for the truth, but only as revealing the state of mind at the time the statement was made, regardless of the truth or falsity of the facts contained in the statement. Professor Wigmore has stated the proposition, as follows: "* * * the utterance is not used for the sake of inducing belief in any assertion it may contain. The assertion, if in form there is one, is to be disregarded, and the indirect inference alone

regarded'' (3 Wigmore on Ev. (2d. Ed.), Sec. 1790, p. 822). It is thus free from the hearsay rule. The important issue is not whether the act recited happened, but whether the statement sheds any reliable light on the state of mind of the declarant. But however relevant the state of mind may be and how definite the statement seems to picture a particular condition of mind, it must be made under circumstances free from suspicion or misrepresentation. *Mutual Life Ins. Co.* v. *Hillmon, supra; Commonwealth* v. *Trefethen, supra; State* v. *Hayward,* 62 Minn. 474, 65 N. W. 63.

Even though an extra judicial statement is not offerred for the truth of the facts contained in it, the declaration must be surrounded with circumstances which show a freedom from suspicion that the statement did not represent the condition of mind of the declarant at the time it is made. The real witness, the declarant, is not on the witness stand, on oath, or subject to cross-examination, which are ordinary safeguards.

In the *Hillmon case,* Mr. Justice Gray was very careful to point out that the letters were written by one Walters under circumstances precluding a suspicion of misrepresentation. That case was immediately followed by Chief Justice Field in the *Trefethen case.*

In *State* v. *Hayward, supra,* Chief Justice Start, of the Minneapolis Supreme Court, states the rule to be, ''That when the question is whether a person did a certain act, his declarations, oral or written, made prior to and about the time he is alleged to have done an act, to the effect that he intended to do it, are ad-

missible as original evidence, if made under circumstances precluding any suspicion or misrepresentation" (l. c. 497). Professor Wigmore quotes that statement by Mr. Justice Start with approval in Sec. 1726, Vol. 3, p. 702, *Wigmore, Evi.* (2d Ed).

The only protection from the danger of a statement that would not show the true condition of mind lies in that rule that requires that the circumstances surrounding the declarations be free from circumstances of misstatement. Misstatement includes expressions either intentionally false, or false because of the declarant's inability to express himself accurately. Whether such circumstances are present is a preliminary matter for the court to decide before the evidence may be submitted to the jury. It is not the function of the jury to decide that question. *Commonwealth* v. *Robinson,* 146 Mass. 571; *State* v. *Wilks,* 278 Mo. 48.

The court held here there was not such a guarantee of trustworthiness in belief of speedy death as to justify admission of the evidence as dying declarations. Neither is there a guarantee of trustworthiness from the circumstances in which the statements were made. Evidence is ample that describes the conditions at or about the time the statements were made. It is condensed and set out by reference at pp. 2-3 of the petition, and shows clearly that at the time the declarations were made Mrs. Shepard could not perceive the state of her own mind, and the circumstances surrounding their making, not only were not free from suspicion, but cast grave doubt on their reliability. And fur-

thermore, as stated by Judge Phillips, "The marital relations between Mrs. Shepard and her husband had become strained. She knew that she had lost the affection of her husband. The statements may have been prompted by a spirit of revenge" (R. 641).

A further fact which casts suspicion and points to the unreliability of the declarations, is that Clara Brown, the nurse who attended Mrs. Shepard, although a registered nurse, attending a case the exact nature of which was baffling three or four doctors, did not report the statement purported to have been made by Mrs. Shepard, that she was poisoned, and kept that information to herself for 25 days, and until after Mrs. Shepard's death, although the revealing of it would have provided the clue for proper medical treatment. Apparently Nurse Brown considered it an irresponsible statement, bedroom chatter, unworthy of consideration and reporting (R. 566-7).

B.

The Circuit Court of Appeals erred in finding and holding that such evidence, not competent for a purpose most obvious to laymen, but admissible for a narrow and restricted consideration, may be submitted to the jury without any direction or limitation by the court as to its use and application.

If the evidence were admissible only to show state of mind, it was for a restricted purpose, and the trial court had a duty to instruct the jury as to its proper use and application. In *Minner* v. *United States* (C. C. A. 10) 57 F. (2d) 506, at page 510, it was said:

> "We conclude that Nelson's and Norton's testimony was admissible to show the latter's acquaintance and association with Minner, and on the question of Minner's intent. However, since the evidence in the case was long and involved, the court should have carefully directed the jury to consider such testimony for such purposes only both at the time of its admission and in the general charge."

The majority opinion approves the decision in *Minner* v. *United States* on the ground that the evidence was long and involved (R. 599). The Minner case had 253 pages in the original record; the Shepard case, 588. The Minner case had 330 pages in the printed record; the Shepard case, 592. The Minner case had 29 witnesses; the Shepard case, 79. The Minner case took 3 days for trial; the Shepard case, 18 days (R. 607, 626).

In *Maines* v. *State*, 23 Tex. App. 576, 5 S. W. 123, it was said:

> "The general rule is 'that whenever extraneous matter is admitted in evidence for a specific purpose, incidental to, but which is not admissible directly to prove, the main issue, and which might tend, if not explained, to exercise a strong, undue, or improper influence upon the jury as to the main issue, injurious and prejudicial to the rights of a party; then it becomes the imperative duty of the court in its charge to so limit and restrict it as that such unwarranted results cannot ensue; and a failure to do so will be radical and revisable error, even though the charge be not excepted to" (l. c. 126).

To the same effect see:

State v. *Lavin,* 80 Ia. 555, 46 N. W. 553;
State v. *Collins,* 127 N. C. 667, 28 S. E. 520;
Thornley v. *State,* 36 Tex. Crim. 118, 35 S. W. 981;
Barnett v. *State,* 104 Ohio St. 298, 135 N. E. 667;
Randall Instructions to Juries, Sec. 300, p. 576.

At page 791, of 14 R. C. L. it is said:

> "But where the evidence is admissible for one purpose only the jury should be instructed that the evidence must be considered only in connection with their consideration of the issue on which it was admissible. * * * it has been held that where evidence is admissible against a defendant on a criminal trial, tending to show the commission of another crime by him, it is the duty of the court, whether requested or not, properly to instruct the jury with reference to the purpose and object of the testimony, where there is danger of a conviction for an offense not charged, or of an unwarranted use of the testimony to the prejudice of the defendant in the case in which he is being tried."

The admission of this evidence to show a state of mind inconsistent with suicide was for a narrow and restricted purpose which is not readily comprehended by laymen. Instruction from the court is necessary to insure proper use of the evidence. Otherwise, rules of evidence are valueless.

Furthermore, the nature of the declaration made it imperative that the trial court instruct concerning the use of the testimony. As it was evidence cast in

testimonial form, just as if the declarant were testifying on the witness stand to the fact recited, the jury would treat it, likely, as a real narrative of the act recited, whereas it is proper, if at all, only as a basis of an inference of intent or state of mind and not for the fact recited. The danger in this situation is more apparent than in cases where the evidence is a direct declaration of intent or state of mind. The jury would readily comprehend it as such and it would not be taken as evidence of an external fact.

Again, the prosecution was attempting to prove the very external fact which the statement recited. It supplied the necessary connection between the crime charged and the petitioner, if taken for the truth of the matter asserted. And again, declarations offered as circumstantial evidence for state of mind must be relevant to the particular issue. On the theory under which the declarations were held proper, the material issue is whether Mrs. Shepard committed suicide. In evidence of this nature, where the harmful effect from facts stated in the declaration is great, the degree of relevancy is important. The process here of connecting the statement with the issue to be determined is complicated. Since there is not a direct statement of state of mind, it is necessary that an inference be drawn from the facts of the declaration to the state of mind; still another inference from the state of mind that she did not in fact commit suicide; another inference that since deceased did not kill herself, there was a murder; and that since there was a murder, it is inferred that the defendant committed it. Thus the relevancy of the particular issue for which this testi-

mony was admitted is so remote from the ultimate issue, that it becomes increasingly important that the jury be made aware of the limited purpose for which the declaration could be used.

Judge Phillips also pointed out that if the declarations have relevancy, they must be considered as a substantive fact of the matter contained in them, which use was held improper by the majority.

These considerations, together with the fact that the petitioner here was charged with a crime of the highest gravity, punishable by death or life imprisonment, and that the evidence was of a serious and fatal nature, made the risk very great, in submitting the evidence to a jury, unlimited and undirected. Proper instruction to the jury is the only protection the petitioner had from improper use of the evidence. *Wigmore on Ev.* (2d Ed.) Sec. 1790, Vol. 3, p. 823. It would seem the duty of the trial court was clear.

C.

The Circuit Court of Appeals erred in finding and holding that in a case where the petitioner was on trial for life, or liberty for life, the failure of counsel to request an instruction to limit the application and use of testimony admitted for a restricted purpose, and his statement that the court's instructions were satisfactory, waived the rights of the accused which would otherwise have been protected, and any right he may have had to have a fair trial assured him by fair and impartial comment on the evidence by the court.

1. THE RIGHT OF PETITIONER TO BE PROTECTED FROM SERIOUS AND PREJUDICIAL ERROR, CAUSED BY FAILURE OF TRIAL COURT TO RESTRICT USE OF TESTIMONY, SHOULD NOT BE WAIVED BY INADVERTENCE OR NEGLECT OF HIS COUNSEL.

But the Circuit Court of Appeals holds the failure of counsel to request an instruction cures the error of no instruction. In the analagous cases, where life and liberty are at stake, this court and other courts have seen fit to notice and relieve from radical error, which is seriously prejudicial to a defendant, although the error was not objected to or excepted to by counsel.

Wiborg v. *United States*, 163 U. S. 632, 16 S. Ct. 1127, 41 L. Ed. 289;

Brasfield v. *United States*, 272 U. S. 448, 47 S. Ct. 135, 71 L. Ed. 345;

Crawford v. *United States*, 212 U. S. 183, 194, 29 S. Ct. 260, 53 L. Ed. 465;

New York Central Railroad Co. v. *Johnson*, 279 U. S. 310, 49 S. Ct. 300, 73 L. Ed. 706;

Weems v. *United States*, 217 U. S. 349, 362, 30 S. Ct. 527, 54 L. Ed. 769;

Reynolds v. *United States* (C. C. A. 10), 48 F. (2d) 762.

Bogileno v. *United States* (C. C. A. 10), 38 F. (2d) 584).

Stassi v. *United States* (C. C. A. 8), 50 F. (2d) 526;

Lamento v. *United States* (C. C. A. 8), 4 F. (2d) 901, 904.

It seems to counsel for petitioner that there is no greater reason for an appellate court correcting errors

in the admission of testimony, where counsel fail to object or except, than for such a court to correct error in instructions given by a trial court when counsel fail to request specific instructions. If a court will notice errors prejudicial in the face of a failure to object and except, it would be even more just not to deny to a defendant proper instructions because of failure of counsel to request them. The court is more than a passive referee with a right and duty to speak only when spoken to, when vital rights are at stake. The exception by which such rights are protected and a just enforcement of the law secured has also been recognized in situations less grave than this:

Skuy v. *United States*, 261 Fed. 316;
McNutt v. *United States*, 267 F. 670 (C. C. A. 8);
Ayres v. *United States*, 58 F. (2d) 607, 609;
Minner v. *United States*, 57 F. (2d) 506.

Judge Phillips puts the issue quite clearly when he says in his dissenting opinion, "That a defendant may be 'waived' into the penitentiary for life is repugnant to my conception of justice" (R. 605). See also, *The Hillmon Case Thirty Years After*, MaGuire, 38 *Harvard Law Review*, at page 718.

In this connection it is most important to note that the declarations were first offered as *res gestae* (R. 526), and then reoffered as dying declarations (R. 562-6). Neither the United States Attorney nor the trial court ever had any idea of introducing them for the limited purpose of showing state of mind. Under such circumstances it would not have availed petitioner anything to have requested an instruction limiting the

use of the testimony, because the request would have been inconsistent with the theory on which it had been offered and admitted. May the Government, some 18 months later, on appeal, change its theory completely, and contend that petitioner should have requested an instruction inconsistent with the theory adopted by the Government? (See dissenting opinion of Judge Phillips, R. 605).

The Circuit Court of Appeals further held that the admission of this testimony generally and unrestricted, even if improperly considered by the jury for the truth of the matter, did not prejudice the petitioner because there was sufficient evidence to convince the jury without it. The truth of that statement is impossible to determine and, for that reason, it is a fundamental principle of general law that errors in the admission of evidence and the instructions to juries in criminal cases are presumed to be prejudicial to a defendant. In *Todd* v. *United States*, 221 F. 205, Judge Sandborn said:

> "Counsel for the plaintiff contend, however, that the error of the admission of this petition is so slight and technical, and the guilt of the defendant is so conclusively proved by other evidence, that the error should be deemed without prejudice to the defendant and the judgment against him should be affirmed. But the legal presumption is that error produces prejudice. It is only when the fact so clearly appears as to be beyond doubt that an error did not prejudice and could not have prejudiced the complaining party that the rule that error without prejudice is no ground for reversal can have effect."

Also, *Sprinkle* v. *United States*, 150 F. 56; *Fina* v. *United States*, 46 F. (2d) 643 (C. C. A. 10). In this case, a direct statement, from the deceased, reported on the witness stand, that the petitioner poisoned her, presented serious and fatal evidence which undoubtedly, if considered for its truth, would connect this defendant with the crime for which he was charged, a connection which otherwise would not exist in the circumstantial evidence presented by the Government (R. 606-7, dissenting opinion). There was by virtue of the highly prejudicial nature of the evidence here complained of a practical and actual injustice caused.

2. THE RIGHT TO A FAIR AND IMPARTIAL TRIAL IN A CAPITAL CASE DICTATES THAT THE RIGHT OF AN ACCUSED TO BE PROTECTED AGAINST UNFAIR AND PARTIAL COMMENT ON THE EVIDENCE, SHOULD NOT BE WAIVED BY NEGLECT OR INADVERTENCE OF COUNSEL.

Reference is hereby made to the principle established by the decided cases (Point C-1, p. 29) to the effect that in a criminal case, involving life and liberty of the accused, the appellate courts of the United States may notice and correct, in the interest of a just enforcement of the law, serious errors fatal to the rights of the defendant, although these errors were not challenged or reserved by objection, exception or assignment of error.

Reserving to the trial court the right to comment fairly and impartially upon the evidence, but recognizing that his influence on the jury is necessary and properly of great weight, and that the slightest word and

intimation is received with deference and may be controlling, this Court, in *Starr* v. *United States*, 153 U. S. 614, 14 S. Ct. 919, 38 L. Ed. 841, has declared that:

> "When there is sufficient evidence upon a given point to go to the jury, it is the duty of the judge to submit it calmly and impartially. And if the expression of an opinion upon such evidence becomes a matter of duty under the circumstances of the particular case, great care should be exercised that such expression should be so given as not to mislead, and especially that it should not be one-sided. The evidence, if stated at all, should be stated accurately, as well that which makes in favor of a party as that which makes against him; deductions and theories not warranted by the evidence should be studiously avoided. That can hardly fail to mislead the jury and work injustice" (l. c. 626).

And in *Reynolds* v. *United States*, 98 U. S. 145, 25 L. Ed. 244, speaking of the review of the evidence, this Court stated that:

> "* * * every appeal by the court to the passions or the prejudices of the jury should be promptly rebuked, and * * * it is the imperative duty of the reviewing court to take care that wrong is not done in this way * * *" (l. c. 168).

In *Cline* v. *United States* (C. C. A. 8), 20 F. (2d) 494, Judge Lewis said:

> "* * * the court's * * * comment on the facts * * * were not fair to the defendant. Only the facts that might have a tendency to

> weigh against the defendant were pointed out—none that weighed in his favor were mentioned. If the court feels that it is under duty to review the facts for the purpose of aiding the jury in a correct understanding of them, it must do so in fairness to both litigants and not state only the facts on one side of the issue'' (1. c. 496).

In *Minner* v. *United States* (C. C. A. 10), 57 F. (2d) 506, Judge Phillips said:

> ''The trial judge undertook to sum up and comment on the evidence. He narrated the important facts testified to by witnesses for the government but he wholly failed to sum up the evidence in behalf of Minner. His comments were in the nature of an argument to the jury rather than a fair and dispassionate statement of what the evidence showed and a tempered expression of his opinion as to the facts. In doing so, he assumed the role of advocate rather than an impartial judge. That this is error is established by repeated decisions'' (1. c. 513).

To the same effect are:

Hickory v. *United States*, 160 U. S. 408, 16 S. Ct. 327, 40 L. Ed. 474;

Rudd v. *United States* (C. C. A. 8), 173 F. 912;

Wallace v. *United States* (C. C. A. 6), 291 F. 972;

Weare v. *United States* (C. C. A. 8), 1 F. (2d) 617;

O'Shaughnessy v. *United States* (C. C. A. 5), 17 F. (2d) 225;

Cook v. *United States* (C. C. A. 8), 18 F. (2d) 50, 51, 52;

Sunderland v. *United States* (C. C. A. 8), 19 F. (2d) 202.

The expression by the trial court, in opening his comments on the evidence, that:

> "from that time on until the date *this murder* is alleged to have been committed * * *"

was prejudicial. In view of conflicting testimony as to the cause of her death, evidence of suicidal intent, and the purely circumstantial character of the proof of murder, such a bold statement placed a definite emphasis upon the weight of the testimony and indicated to the jury that the proper finding from it all was *murder*. Thus the petitioner found himself at the outset in the hands of a jury whose only duty was to determine whether he had committed the murder.

After stating the testimony to the effect that mercury had been found in the viscera of the deceased, the court said to the jury,

> "There then arises these two questions:
> "Did this woman die of mercurial poisoning?
>
> "and, secondly,
>
> "Did the defendant, Charles A. Shepard, administer the mercury to her as charged in the Indictment?" (R. 585.)

In view of the abundant testimony of other causes of death and negativing death by mercuric poisoning, the statement, "Did this woman die of mercurial poisoning" foreclosed the consideration of other causes of death, and, instead of permitting the jury to weigh

all of the evidence and determine from it whether all other reasonable hypotheses than mercurial poisoning could be excluded, the court made the determination for them, and then emphasized it by saying, "The first question may not be difficult to answer" (R. 585). And assuming that the jury was satisfied that death had been caused by mercurial poisoning, the fact that there was abundant evidence as referred to in the petition (p. 8) that the mercury found in the viscera could have got, and did get there, and had been absorbed from mercury mouthwash, the second interrogatory that, "Did the defendant, Charles A. Shepard, administer the mercury to her as charged in the Indictment," tended to emphasize that fact and minimize every other method by which the mercury got into the deceased's body. Thus, instead of giving the petitioner the benefit of the doubt, the court cast the burden upon him, in that, as stated, the question caused the jurors to start with the proposition that Shepard administered the poison and weigh all other methods against it to see if the evidence of them would be heavy enough to overcome the starting conclusion that Shepard had administered it.

The court stated the evidence favorable to the Government with great minuteness but did not state the evidence favorable to the defendant fully and accurately. In his comment as to the cause of death he took each of the Government specialists by name, told what each did and testified to, and that each had expressed the opinion that Mrs. Shepard had died from mercurial poisoning (R. 585-6); told the interesting things about

the action of mercury upon the human system, but all that the court said with reference to other causes of death was that, "There was evidence tending to show that the deceased, Zenana Shepard, had made threats of suicide and statements to the effect she wanted to die" (R. 590), and that: "Major Rose had diagnosed her case as Vincent's angina" (R. 587). No other comment was made as to the other causes of death. Although the evidence showed an abundance of evidence indicating that death might have been caused by other diseases or suicide, and which negatived mercuric poisoning (Petition pp. 6-8), the court failed to state any of it.

In his comment on the evidence as to whether Shepard administered the poison, the court stated that as a physician and Officer of the Day, petitioner had access to the dispensary where there was bichlorid of mercury; that he had written three prescriptions in December, 1928, March and April, 1929, for mercury; that he had got two boxes of empty capsules in March or April, 1929, and then discussed the motive growing out of the relationship with the Brandon girl (R. 587-8-9). The only statement made by the court to the jury as to the other evidence showing how the mercury got in the viscera was that, "There was * * * also evidence as you will recall, tending to show she might have been poisoned by the mouthwash" (R. 590), and that, "There has been testimony introduced that the deceased might have absorbed by the use of this mouthwash, if that quantity were used, enough mercury to account for the amount of mercury found in the

viscera of the deceased" (R. 587). Would it not have been more judicial and fair to have pointed out the evidence of both Government and defense witnesses tending to prove death could have been and possibly was caused by the absorption of mercury with which she was being treated for another disease (see Petition, p. 8)?

In the light of this testimony, the amount of mercury mouthwash used by Mrs. Shepard was important. The court told the jury that Major Rose had prescribed a mouthwash but did not even state that it contained mercury when he prescribed it (R. 587), nor that Rose said that four or five pints of this solution were used during the time he treated her (R. 371) and that each pint contained approximately 2 grains of mercury (R. 370). The court stated that if that quantity were used enough mercury might be absorbed to account for the amount found in the viscera (R. 587) but immediately stated that Nurse Brown testified that only about ½ pint of the solution was used (R. 587), but did not state that Major Rose personally administered the mouthwash, sometimes twice a day, and over a period of two weeks—21 times in all—and personally administered more than a pint of the solution to Mrs. Shepard (R. 570); and left the implication that Shepard, as Officer of the Day, probably was the one who got the poison, and administered it, by failing to state any of the other evidence to show that there was nothing unusual about Dr. Shepard's getting mercury (Petition, pp. 8-9).

Such unfavorable and one-sided comment was bound to be prejudicial and the court should protect the

petitioner therefrom in the interest of a fair administration of justice.

D.

The Circuit Court of Appeals erred in finding and holding that there was no error in the trial court's disqualifying jurors who had not formed an opinion, or without examining them to ascertain whether they had formed an opinion, where the defendant had exhausted all of his peremptory challenges, and that under such circumstances the accused had had a fair and impartial trial.

The Sixth Amendment to the Constitution of the United States provides that:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy public trial, by an impartial jury of the state and district wherein the crime shall have been committed * * *."

Sec. 411 of Title 28 U. S. C. A., being Sec. 275 Judicial Code, provides:

> "Jurors to serve in the courts of the United States, in each state respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned."

Sec. 424 U. S. C. A., Title 28, being Sec. 287, Judicial Code, provides that:

> "When the offense charged is treason or a capital offense, the defendant shall be entitled to twenty and the United States to six peremptory challenges. * * * All challenges, whether to the array or panel, or to the individual jurors for cause or favor, shall be tried by the court without the aid of triers."

Secs. 43-102, 43-140, 43-141, and 60-2906 R. S. Kansas, 1923, with reference to the qualifications of jurors, are set out as Appendix "A."

Three jurors were disqualified who upon examination stated that they had no opinion and seven were excused, summarily, without any examination by which it could be ascertained whether or not they had an opinion (R. 38-49).

The mere reading of a newspaper account pertaining to a case or trial does not disqualify a juror. This rule was established by this Court in *Reynolds* v. *United States*, 98 U. S. 145, 25 L. Ed. 244, wherein the court said:

> "The theory of the law is that a juror who has formed an opinion cannot be impartial. Every opinion which he may entertain need not necessarily have that effect. In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits. It is clear, therefore, that upon the trial of the issue of fact

> raised by a challenge for such cause the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence."

To the same effect see *State* v. *Medlicoti*, 9 Kan. 257; *State* v. *Spaulding*, 24 Kan. 1; *State* v. *Morrison*, 64 Kans. 669, 678; *Hopt* v. *Utah*, 120 U. S. 430-432.

The Circuit Court of Appeals held that the determination of the qualifications of jurors was for the trial court and was not reviewable unless there was an abuse of discretion and that was not shown (R. 595). The error complained of is not because the court examined the jurors but that it neither examined them nor permitted them to be examined, to determine whether they entertained an opinion, and that to thus excuse them summarily was an abuse of discretion. This court has determined the specific manner in which disqualification should be determined. Chief Justice Waite, in *Spies* v. *United States*, 123 U. S. 179, 8 S. Ct. 30, 31 L. Ed. 80, stated that before jurors could be excused for cause it should have been

> "made clearly to appear that upon the evidence (that) the court ought to have found the juror had formed such an opinion that he could not, in law, be deemed impartial."

In *Reynolds* v. *United States*, 98 U. S. 145, 156, 157, 25 L. Ed. 244-6-7:

> "The affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the persumption of partiality, the juror need not necessarily be set aside. * * *"

And in *Remus* v. *United States,* 291 F. 501, the court said:

> "* * * the court should consider the statements made under oath by the juror himself in reference to his impartiality and his freedom from prejudice. * * *"

The right of the trial court to determine the qualifications of jurors is not absolutely final, otherwise the courts would not have stated that it could be reviewed in the event of an abuse of discretion. Counsel are not able to find any Federal cases bearing directly on the point in the case at bar. But that matter has been touched squarely in the following cases:

State v. *Willie,* 130 La. 454; 58 So. 147;
Welsh v. *Tribune Publishing Co.,* 83 Mich. 661, 47 N. W. 562;
State v. *Diedtman,* 58 Mont. 13, 190 Pac. 117;
Aaronson v. *State,* 56 N. J. L. 9, 27 Atl. 937;
Hildreth v. *City of Troy,* 101 N. Y. 234; 4 N. E. 599;

from which these principles are deducible: That a court has no right of peremptory challenge; that an accused need not take a jury selected for him by the court, but is not only entitled to a fair and impartial jury, but to a jury selected by method established by law, and that it cannot be said that no injury re-

sults to the accused because he "still had a fair and impartial jury," for he is entitled to have the benefit of the range of selection from the panel not limited by disqualifications not based upon a determination of the fact.

The defendant exhausted all of his challenges (R. 49). The practical result is that the court on his own motion, and without good cause, excused 10 jurors whom the defense might not have desired to excuse and in that way added to the number of peremptory challenges available to the Government. When the court excused the juror without any cause whatsoever, he in effect exercised a peremptory challenge. His discretion is confined to excusing the juror, not upon his own volition, but upon a determination based upon the facts that there is a good ground for believing that he would not be impartial. If he can discharge one in that manner, he can discharge any number and thereby confine the accused to a choice of jurors from a part of the panel of his own choosing rather than from the whole. Had the court permitted their examination and it were shown that there was no basis upon which to disqualify, then there would have been 10 competent jurors available to the defendant, selected according to law, whose right to have passed upon his case was a right of the petitioner but to whom the court has said, "No, you cannot choose from these, you must pick out of this other group whom I think will make good jurors for you."

We submit that under the authorities cited a fair and impartial jury includes the right to have a choice of the best men on the panel, selected by the methods

established by law, without having the range of selection limited by excluding from the panel competent jurors without legal cause.

Petitioner earnestly submits that the United States Circuit Court of Appeals, Tenth Circuit, committed prejudicial error in its rulings on the matters hereinabove discussed, and that, in view of the vital importance of the questions involved to the rights of this petitioner, and the fair and clear administration of justice, this Court should issue its writ to review and decide these questions.

Respectfully submitted,

HARRY W. COLMERY,
BALFOUR S. JEFFREY,
C. L. KAGEY,
L. M. KAGEY,
Counsel for Petitioner,
Charles A. Shepard.

APPENDIX A.

"They shall select from those assessed on the assessment roll of the preceding year suitable persons having the qualifications of electors, and in making such selection they shall choose only those who are not exempt from serving on juries, and who are possessed of fair character and approved integrity, and in possession of their natural faculties, and not infirm or decrepit, and who are well informed and free from legal exceptions: *Provided,* That no person shall be selected as a juror who either in person or by any other means shall solicit his selection as such; and the trustee of each township and the mayor of each city shall each select at least one such person for each fifty inhabitants therein" (Sec. 43-102 R. S. 1923).

"None of the following persons shall be compelled to serve as jurors: *First,* any member of the militia or fire company; *second,* any person under the age of twenty-one years or over the age of sixty-five years; *third,* any person who is not sufficiently acquainted with the English language to read and write the same and to understand thoroughly the proceedings ordinarily had in courts of justice; *fourth,* any person exercising the functions of clergyman, practitioner of medicine, druggist or apothecary, attorney at law, or any professor or other teacher of any school or institution of learning; *fifth,* any person of bad reputation or without visible means of support; *sixth,* any person who has served on a regular panel as a juror in any court of record in the county within one year last passed; *seventh,* any person who has been convicted of a felony; *eighth,* any person not drawn or selected according to the povisions of this act; and every juror selected according to this act shall possess the qualifications required by the laws of this state" (Sec. 43-140 R. S. 1923).

"Any party may challenge any juror for cause for any reason mentioned in the last section, and also for any causes authorized by the laws of the state" (Sec. 43-141 R. S. 1923).

"It shall be good cause for challenge of any person called to serve as a petit juror that he has been convicted of any crime which by law renders him disqualified to serve as a juror; or that he has been arbitrator of the same controversy, or has an interest in the action, or has an action pending between himself and any party to the action, or is the employer, employee, counsellor, attorney or agent of either party, or is a witness in the action, or is of kin to either party, or is not qualified, under the law of the state, to serve as a juror, or has served on a jury as a talesman on the trial of any cause in the same court during the term, or has formerly been a juror in the same action; *Provided,* That in actions against cities or other municipal corporations a taxpayer therein shall not be disqualified by reason thereof. These causes shall be considered as principal causes of challenge, and their truthfulness be tried by the court. Any person called to serve as a petit juror against whom no principal cause of challenge exists may nevertheless be challenged on suspicion of favor to or prejudice against either party to the action, or for inability to read the English language, or for want of competent knowledge of the language, or for any other cause that in the opinion of the court may render him at the time an unsuitable juror. The validity of such challenge shall be determined by the court" (Sec. 60-2906 R. S. 1923).